OD-4 ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

AP NO. 28 OF 2025
SRI SWAPAN PAUL
VS
M/S. PAUL CONSTRUCTION

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 27th March, 2025.

Appearance:
Mr. Partha Chakraborty, Adv.
Mr. Rishabh Dutta Paul, Adv.
For petitioner

1. Insertions in “The Statesman” and in “Aaj Kaal” have been made. Thus substituted service has been effected.
2. This is an application for appointment of a learned arbitrator for adjudication of the disputes arising out of a notarized agreement for sale dated June 12, 2015, which was entered into between the parties.
3. The petitioner offered to purchase some land from the respondent for a consideration of Rs. 16 lakhs, being the cost of land and development charges for the land. The vendor/respondent accepted such proposal and agreed to sell the land to the petitioner upon development of the same. Certain terms and conditions in the said agreement were elaborated in the said agreement. Clause 14 of the said agreement deals with settlement of disputes and provides that all disputes and differences

between the parties shall be settled amicably, failing which the matter shall be referred to the arbitration, in accordance with the Arbitration and Conciliation Act, 1996. The arbitrator shall be appointed by the company.

4. It is the specific contention of the petitioner that although an amount of Rs. 16 lakhs had been paid, the vendor/respondent did not fulfill and/ or perform the obligations contained in the said agreement. The petitioner submits that amicable settlement was attempted, but had failed. The petitioner relies on a letter of August 12, 2022, which is a complaint before the Inspector-in-Charge, Kalitala Ashuti Police Station. According to the petitioner, Paul Constructions and its men and agents were outsiders and did not have any right to obstruct the petitioner's ingress and egress to the property. Further complaint was that the men and agents of Paul Construction were threatening the petitioner with dire consequences. After two years therefrom, the petitioner filed an application under section 9 of the Arbitration and Conciliation Act, 1996 in the Court of the learned District Judge, South 24 Parganas at Alipore for interim protection. The respondent was restrained from alienating the scheduled property to any other person and the parties were directed to maintain status quo.

5. Thereafter, the petitioner invoked arbitration by a letter dated December 24, 2024.

6. In my view, the petitioner is seeking specific performance of an agreement which was executed on June 12, 2015. There is nothing on record which would show how and when the petitioner had paid the alleged amount of Rs.16,00,000/-. There is nothing to show that at any time, the liability was acknowledged by the respondent. Although, the petitioner claims to have paid to the respondent Rs.16 lakhs, there is nothing on record to show such payment and the date of such payment.

7. It is well settled that the period of limitation to invoke arbitration is three years from the date of accrual of the cause of action. In the decision of ***Arif Azeem Co. Ltd. vs Aptech Ltd.*** reported in ***(2024) 5 SCC 313***, the Hon'ble Apex Court held as follows:-

> ***72.*** In ***Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited*** reported in***(2021) 5 SCC 738***, this Court while observing that although the arbitration petition was not barred by limitation, yet the cause of action for the underlying claims having arisen much earlier, the claims were clearly barred by limitation on the day notice for arbitration was invoked. Relevant paragraphs are extracted hereinbelow:
>
> > "48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on

which the cause of action originally arose, there can be no basis to save the time of limitation.

49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, when the claims made by Nortel were rejected by BSNL. The respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions.

50. In the notice invoking arbitration dated 29-4-2020, it has been averred that:

"Various communications have been exchanged between the petitioner and the respondents ever since and a dispute has arisen between the petitioner and the respondents, regarding non-payment of the amounts due under the tender document."

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions.

Section 9 of the Limitation Act makes it clear that: "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

> 52. In the present case, the notice invoking arbitration was issued 5½ years after rejection of the claims on 4-8-2014. Consequently, the notice invoking arbitration is ex facie time-barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case." (emphasis supplied)

****

87. Similarly, in ***Bharat Sanchar Nigam Limited (supra)***, it was held by this Court thus:

> "51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that: "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail." (emphasis supplied)

8. In the above decisions, it was held that time to invoke arbitration was 3 years from the date of accrual of the cause of action. For the first time the petitioner approached the respondent by invoking arbitration on December 24, 2024. The petitioner sat in silence for 9 years. A referral court need not conduct a mini trial in order to ascertain whether the claim was time barred or not, but the referral court should also restrain

itself from referring ex facie time barred disputes, instead of relegating a party to litigate in respect of manifestly inadmissible claims. On the basis of the records, this Court finds that in this particular case, limitation is not a mixed question of law and fact.

9. The claim is a manifestly 'deadwood'. In ***Arif Azim(supra)*** it was held that:-

> "**68.** Although, limitation is an admissibility issue, yet it is the duty of the Courts to prima facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process.
>
> **70.** The scope of this primary examination has been carefully laid down by a three-Judge Bench of this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 :
>
> > "148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and the Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium NaftaProducts Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

***

154. … 154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

71. The aforesaid decision in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] was relied upon and reaffirmed in another decision of this Court in NTPC Ltd. v. SPML Infra Ltd. [NTPC Ltd. v. SPML Infra Ltd., (2023) 9 SCC 385] wherein the "Eye of the needle" test was explained as follows : (SPML Infra case [NTPC Ltd. v. SPML Infra Ltd., (2023) 9 SCC 385] , SCC pp. 401-402, paras 25-28)

"Eye of the needle

25. The abovereferred precedents crystallise the position of law that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the Referral Court may reject claims which are manifestly and ex facie non-arbitrable [Vidya Drolia case, (2021) 2 SCC 1, para 154.4] . Explaining this position, flowing from the principles laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , this Court in a subsequent decision in Nortel Networks [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5

SCC 738, para 45.1 : (2021) 3 SCC (Civ) 352] held : (SCC p. 764, para 45)

> '45. … 45.1. … While exercising jurisdiction under Section 11 as the judicial forum, the Court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute.'

27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral Courts must not undertake a full review of the contested facts; they must only be confined to a primary first review [Vidya Drolia case, (2021) 2 SCC 1, para 134] and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is bona fide or not. [Vidya Drolia case, (2021) 2 SCC 1, para 154.4] The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. [Nortel Networks case, (2021) 5 SCC 738, para 47] On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration [Vidya Drolia case, (2021) 2 SCC 1, para 154.4] .

28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the Referral Court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable [Vidya Drolia case, (2021) 2 SCC 1, para 154.4] . It has been termed as a legitimate interference by Courts to refuse reference in order to prevent wastage of public and private resources [Vidya Drolia case, (2021) 2 SCC 1, para 139] . Further, as noted inVidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court [Vidya Drolia case, (2021) 2 SCC 1, para 139] . Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd. [DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743, paras 22 & 26]"

10. In the matter of ***SBI General Insurance Co. Ltd. vs Krish Spinning*** reported in ***2024 SCC Online SC 1754***, the Hon'ble Apex Court held as follows:-

"**126.** Before, we close the matter, it is necessary for us to clarify the dictum as laid in Arif Azim Co. Ltd. v. Aptech Ltd. reported in 2024 INSC 155, so as to streamline the position of law and prevent the possibility of any conflict between the two decisions that may arise in future.

127. In Arif Azim (supra), while deciding an application for appointment of arbitrator under Section 11(6) of the Act, 1996, two issues had arisen for our consideration:

i. Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the petition filed by M/s Arif Azim was barred by limitation?

ii. Whether the court may decline to make a reference under Section 11 of Act, 1996 where the claims are ex-facie and hopelessly time-barred?

128. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that it is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that "the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice."

129. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.

130. On the second issue it was observed by us in paragraph 67 that the referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to "prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process."

131. Our findings on both the aforesaid issues have been summarised in paragraph 89 of the said decision thus:—

"89. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test - first, whether the petition under Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal."

11. AP No. 28 of 2025 is, accordingly, dismissed.

(SHAMPA SARKAR, J.)

Sb/pa/SN